IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 457 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SHAIKH FAZAL SHAIKH NAZIR

Versus

COMMISSIONER OF POLICE

Appearance:

MS BANNA DUTTA for MR ANIL S DAVE for Petitioner

MR ND GOHIL, Ld. AGP forr Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 23/05/2001

ORAL JUDGEMENT

1. Heard Ms.Banna Dutta, learned advocate for the petitioner and Mr.N.D.Gohil, learned AGP for the respondent - State.

2. In the present petition under Article 226 of the Constitution of India, the petitioner has challenged the detention order dated 30th November, 2000 passed by the Police Commissioner, at Surat under Sub Section (1) of

Section 3 of the Prevention of Anti Social Activities Act (hereinafter shall be referred to as "the PASA Act" for short). The petitioner has been detained at District Jail, Jamnagar as Class II detenu. The grounds of detention have been communicated and supplied to the present petitioner by a letter dated 30th November, 2000. According to the grounds of detention against the present petitioner, one case is registered under the Prohibition Act which has been filed by the concerned Authority.

3. Ms.Banna Dutta, learned advocate for the petitioner has raised contentions challenging the detetion order on the ground that the detaining authority has considered the aspect of proceedings under Section 57 of the Bombay Police Act, which show total non application of mind in as much as even if there was a conviction, no action could have been initiated under Section 57 of the Bombay Police Act against the petitioner. For attracting the rigors of Section 57 of the Bombay Police Act, there should be minimum three convictions under the Bombay Prohibition Act and there is only one registered case against the petitioner. This contention has been raised by the petitioner in the present petition and the detaining authority has considered the same at page-26 of para-(3). Ms.Banna Dutta has submitted that this ground is enough to vitiate the order of detention. Ms.Banna Dutta has relied upon the decision of this Court in the case of Jayanti Nanumel Ramnani V/s. Commissioner of Police, Rajkot, reported in 2000 (2) GLH 166. Ms.Banna Dutta has also submitted that considering the aforesaid decision of this Court, recently, this Court has considered Special Civil Application No.11743 of 2000 dated 9th May, 2001 passed by this Court (Coram : Mr.H.K.Rathod,J.). Therefore, according to the submissions of Ms.Banna Dutta, learned advocate for the petitioner, the detention order is required to be set aside which has been covered by two decisions of this Court. Ms.Banna Dutta has also submitted that the present petitioner has co-accused in respect to the Special Civil Application No.12726 of 2000 by Smt.Sakinabibi w/o. Babubhai Amanulla Ansari. Therefore, the present petitioner has raised contentions which the same has been contended by Smt.Sakinabibi w/o. Babubhai Amanulla Ansari before this Court.

4. Mr.N.D.Gohil, learned AGP for the respondent State has raised an objection against the submissions made by Ms.Banna Dutta, learned advocate for the petitioner. However, the respondent - State has not filed any reply against the present petition, inspite of the fact that the sufficient opportunity has been given

by this Court. Mr.N.D.Gohil has submitted that the detaining authority has rightly considered the effective provisions of Section 57 of the Bombay Police Act and the decision which has been relied upon by the learned advocate for the petitioner reported in 2000 (2) GLH 166 is not applicable to the facts of the present case.

5. I have heard the learned advocates appearing on behalf of the respective parties. The respondent-State has not filed affidavit in reply in spite of the fact that sufficient opportunity has been given to the respondent-State. Therefore, there is nothing on record to show that the representation which has been referred by the petitioner on page 70 has not been considered by the respondent-State and, therefore, not to consider the representation submitted by the petitioner, it amounts to denying the legal right of the petitioner and which violates Article 22(5) of the Constitution of India.

6. There is no material on record produced by the respondent-State which justified the fact that the representation has been considered by the respondent-State. In absence of such material, there is no option with the Court except to accept the submission of learned advocate for the petitioner.

7. Contention in respect to Section 57 of the Bombay Police Act, the view taken by this Court is squarely covered the contention which has been raised by the learned advocate Ms.Banna Dutta. The relevant observation made by this Court in para-(7) is relevant. It has been observed by this Court that taking into consideration rival side contentions, the first aspect that attracts the attention of this Court is the defect in considering the alternative less drastic remedy.In the grounds of detention the authority has stated that resorting into the proceedings under Section 57(C) is considered by it, but for that purpose at least two convictions are necessary for resorting to that remedy. Whereas in the instant case there is only one case registered against the petitioner which is pending investigation and, therefore, it is not possible to resort to Section 57(C) of the Bombay Police Act. Thereafter, this Court has further observed in para-7.1 as under:

> "Apart from this, another factor that requires consideration is that whether consideration proceedings under Section 57(C) of the Bombay Police Act was in fact a genuine consideration of less drastic remedy. Considering Section 57(C)

> of the Bombay Police Act less drastic remedy was not legally available in the facts of the case and, there was no question of considering it. In fact, what the authority ought to have considered was the possibility of resorting to less drastic remedy which is legally available and can be resorted to. That is not considered by the detaining authority which reflects non-application of mind. In this regard, decision in the case of Mava Arjan Parmar v. Commissioner of Police rendered by Division Bench of this Court on 6.11.99 and reported in 1990 (1) GLR 481 may be referred to. In that case, the petitioner was detained under Section 3 on the ground that he was a bootlegger. The Division Bench held that detention order deserves to be quashed as the detaining authority did not consider the possibility of resorting to less drastic remedy under Section 56 of the Bombay Police Act. The decision was based on an earlier decision of the Division Bench of this Court in the case of Bhypatbhai @ Undardo v. Commissioner of Police, Vadodara, in Special Criminal Application No.1344 of 1989 decided by Division Bench of this Court on 6.3.1990. In this view of the matter, the order of detention deserves to be quashed."

8. I have considered the decisions of this Court and also considering the fact that the representation which has been made by the petitioner has not been considered by the respondent-State and it is a case of one offence registered against the present petitioner. That relevant provisions of Section 57(C) of the Bombay Police Act is not available to the detaining authority because it requires at least two convictions and, therefore, according to my opinion, the detention order has been passed by the detaining authority without application of mind and, this detention order is also violated under Article 22(5) of the Constitution of India and, therefore, detention order is vitiated.

9. In the result, the present petition succeeds and the same is allowed. The order of detention dated 30th November,2000 is vitiated and resulted to quash and set aside. The detenu Shaikh Fazal Shaikh Nazir who has been detained at District Jail, Jamnagar be set at liberty forthwith if he is not required in any other case. Rule is made absolute accordingly. No order as to costs. Direct service is permitted.

(H.K.Rathod,J.)

(vrpanchal)*